State of Iowa (First Judicial District)/P.P.M.E. Local 2003

2002-2003
CEO-882
Sector 3

Report and Recommendations of the Fact Finder in the Impasse Between PUBLIC PROFESSIONAL AND MAINTENANCE EMPLOYEES LOCAL UNION #2003 - IUPAT and JUDICIAL DEPARTMENT OF THE STATE OF IOWA, FIRST JUDICIAL DISTRICT	PERB Case No. 882/3 Fact Finder: Stephen L. Hayford February 11, 2003

PRELIMINARY STATEMENT

This Impasse was presented to the Fact Finder at a hearing held on January 28, 2003, in Waterloo, Iowa. The Parties did not file post-hearing briefs.

APPEARANCES

For the Union:

Joe Rasmussen	Business Representative and Spokesperson
Deb Zenner	Bargaining Team Member
Mickey Jackson	Bargaining Team Member
Cindy Schmit	Bargaining Team Member

For the Employer:

William Snyder	Director of Human Resources, Iowa Judicial Branch, and Spokesperson
Linda Nilges	Acting District Court Administrator
Clay Gavin	Clerk of Court – Dubuque County
Waynette Saul	Clerk of Court – Blackhawk County

I. BACKGROUND

Public Professional and Maintenance Employees (PPME) Local Union No. 2003 represents approximately 105 employees of the First Judicial District of the Iowa Judicial Branch. Those employees work primarily in the Clerk of the District Court Offices in the eleven county courthouses in the District, in the offices of the District Court Administrator in Waterloo and Dubuque, Iowa, or in the offices of Juvenile Court Services throughout the District. Similar employees in the other seven judicial districts in the State of Iowa are represented by the American Federation of State, County and Municipal Employees (AFSCME).

II. THE ISSUES AT IMPASSE

The following issues at impasse were presented by the Parties to the Fact Finder for his consideration:

1. ARTICLE V, SENIORITY
   Section 1 Definition
   Section 3 Retroactivity Prohibited

2. ARTICLE VI, LAYOFF PROCEDURE
   Section 1 Application of Layoff
   Section 2 General Layoff Procedure

3. ARTICLE VII, TRANSFERS AND VACANCIES
   Section 1 Definition of Vacancy
   Section 2 Voluntary Transfers

4. ARTICLE VIII, HOURS OF WORK
   Section 3 Overtime

5. ARTICLE IX, WAGES AND FRINGE BENEFITS
   Section 1 Wages
   Section 2 Deferred Compensation
   Section 4 Health Insurance
   Section 5 Dental Insurance

III. POSITION OF THE UNION

The Union proposes several changes to the Collective Bargaining Agreement that it believes are necessary in order to fill gaps and resolve ambiguities in existing contract provisions pertaining to seniority, layoff, and transfers. Those gaps and ambiguities came to light as a result of several recent arbitration awards arising under the Agreement. Those awards are addressed in some detail in the Analysis section below. The Union also proposes changes in Agreement language pertaining to overtime, shift differentials, and job classifications. Finally, it seeks an increase in the wages of bargaining unit employees and proposes certain changes in the dental insurance benefits afforded bargaining unit members.

Issue 1: Seniority

The Association proposes the following changes to Article V, the Seniority provision of the Collective Bargaining Agreement:

A. Change Section 1, Definition, the first sentence of the first paragraph to read:

> Seniority means an employee's length of continuous service in the bargaining unit in a permanent position since his/her date of hire.
>
> And change the first sentence in the third paragraph to read:
>
> An employee's continuous service record for purposes of seniority shall be broken by voluntary resignation, discharge for just cause, retirement, or promotion to a non-bargaining unit position with the Employer.

B. Change the title of Section 3, Retroactivity Prohibited, to Determination of Bargaining Unit Seniority, and change the text of Section 3 to read:

> The date of hire for bargaining unit employees shall be established by the July 1, 2001 bargaining unit seniority list as revised October, 2001. Employees entering the bargaining unit after July 1, 2001 shall have a seniority date established by the date upon which they entered the bargaining unit in a permanent position.

The proposed changes in Sections 1 and 3 of Article V are the result of the Employer's actions in November and December 2001 in first positing ten new full-time Judicial Clerk III vacancies and subsequently permitting non-bargaining unit supervisory employees whose jobs were being eliminated to bid into those newly created bargaining unit vacancies based on their length of service. Two weeks before the November 13 posting of the new positions, on November 2, 2001, the Employer had issued a layoff notice to the Union declaring its intent to eliminate an unspecified number of bargaining unit positions.

As a result of the Employer permitting non-bargaining unit supervisory employees to bid into these newly created bargaining unit positions, while at the same time laying off bargaining unit members, the Union filed a grievance. That grievance was advanced to arbitration before Arbitrator Neil Bernstein, who denied it because he did not find specific contract language prohibiting non-bargaining unit employees from bidding on bargaining unit jobs. Arbitrator Bernstein also held that once in those bargaining unit positions, the former supervisors' seniority would date back to their initial date of hire with the Employer into a permanent position with the State Judicial Department.

The Union asserts that its proposal is intended to clarify the seniority for bargaining unit purposes and applies only to bargaining unit service and bargaining unit employees. The Union questions whether it is even legal for the Employer to grant non-bargaining unit supervisors seniority credit for time worked in non-bargaining unit jobs. The proposed modification in Section 3 of Article V is intended to further remedy the problems caused by the insertion of non-bargaining unit supervisors into bargaining unit positions with full employment seniority credit. The proposed change would tie all bargaining unit members' seniority to the bargaining unit seniority held as of July 1,

2001, the day of the last seniority list published pursuant to the Collective Bargaining Agreement before the supervisors were moved into the bargaining unit.

Issue 2: Procedures for Staff Reduction

The Union proposes the following changes to the Article VI, Layoff Procedure provision of the Collective Bargaining Agreement:

A. Add to Section 1, Application of Layoff, the following:

   C. During the term of this collective bargaining agreement, the Employer shall utilize the layoff procedure and shall not utilize any bargaining unit wide reduction of hours through unpaid furloughs without mutual agreement with the Union to utilize furloughs in lieu of layoffs.

B. Change the last paragraph of Section 2, Layoff Procedure Changes, sub-section G, part 2 to read:

   Any employee who elects to bump and remain on active employee status in the bargaining unit shall have the right of recall to the classifications the employee formerly occupied, before any other person may be promoted to, or an employee removed from active status by lay off is recalled, or a new employee is hired for such classification by the Employer enforcing the layoff. Recall for bumped employees shall be offered in order of seniority beginning with employees with the greatest bargaining unit seniority who formerly occupied the classification provided that the employee shall not lose their right of recall by refusing recall to a position that is less in full-time equivalent than the employee formerly occupied in that classification.

C. Add to the first sentence in Section 2, subsection H, Recall, the words:

   Any employee laid off **and removed from active payroll status** because of a reduction in force shall be offered .....

D. Add to Section 2, subsection H, Recall, part 1 a new sentence d) to read:

   d) A laid off employee who rejects recall to a position that is less in full-time equivalent or in a lower pay grade than the employee previously occupied shall not lose their recall right to a position equal or greater in hours to their previous position or equal or greater in pay grade.

E. Delete Section 2, Subsection I.

In addition to the layoff-related changes it proposes in Article VI, the Union would also alter Section 1 of Article VII, the Transfers and Vacancies provision of the Agreement, in the following manner:

Change the order of filling of vacancies in Section 1 to read:

1. Recall laid off bargaining unit employees exercising bumping rights (Article VI – Section 2G)

2. Voluntary transfer of bargaining unit employees (Article VII – Section 2)
3. In-house posting of bargaining unit employees (Article VII – Section 3)
4. Recall laid off bargaining unit employees removed from active payroll status (Article VI – Section 2H)
5. New hire from outside the bargaining unit

This set of proposals by the Union also relates directly to the award of Arbitrator Bernstein and springs from two grievances subsequently filed by bargaining unit employees Jackson and Schmit, who were bumped out of their Judicial Clerk III jobs by the supervisors who entered the bargaining unit in late 2001. Ms. Jackson's and Ms. Schmit's grievances arose when vacancies subsequently occurred in the Judicial Clerk III classification and they were denied recall rights to their former classification.

When both cases were arbitrated, the Union maintained that pursuant to Section 2.G. of Article VI, the Parties intended that employees who were notified of layoff and exercised their bumping rights to remain on the job were to be treated differently from employees who were actually laid off and displaced from employment. The Employer maintained that the intent of Article VI, Section 2.G. was that all laid-off employees would be treated the same, effectively denying any special treatment or any right to recall by employees who bumped down to avoid being displaced from employment.

The Union characterizes its proposal as an effort to correct this problem of interpretation and administration by specifically defining the difference in employees who exercise their bumping rights and remain on the payroll as opposed to the least senior employee who is laid off and displaced from employment. The Union maintains its proposal is also intended to deal with a circumstance that arose after the 2001 layoffs. This new problem concerns full-time employees who are laid off and then offered recall to part-time jobs who as a result lose their two years of recall rights by refusing the lesser, part-time job. Because nearly some 22 percent of jobs within the bargaining unit are less than full-time positions, and because more hours reductions could be in the offing due to the Employer's budget concerns, the Union asserts this is likely to become more of a problem in the future.

The final dimension of the Union's proposal would require the Employer to first utilize the contractual layoff procedure to achieve reductions in hours before employing furloughs requiring bargaining unit employees to take days off without pay. The Union reasons it is better to lay off one or two junior employees than to effectively cut everyone's pay by forcing them to take unpaid days off, without their work loads being concomitantly reduced.

Issue 3: Transfer Procedures

The Union proposes the following changes in the Article VII, Transfers and Vacancies provision of the Collective Bargaining Agreement:

A. Change (1) under Section 1, Definition of Vacancy, to read:

    1. When the employer has approval to increase the work force, or increase the number of employees in a job classification, and decides to fill the new position.

B. Change the fourth sentence of Section 2, Voluntary Transfers, to read:

> When a job vacancy occurs, employees with a transfer request on file **and employees filing a transfer request during the posting period in Section 3** shall be offered the transfer in order of seniority, provided employee possesses the current ability to perform the job.

These proposed alterations of the Agreement have their origin in a 1998 arbitration decision by Arbitrator Herbert Berman interpreting Article VII, Section 1. Arbitrator Berman ruled that "to increase the work force" as contemplated by Article VII, Section 1, the number of bodies in the bargaining unit must be increased. Thus, when a new Case Coordinator III position was created but the total number of Case Coordinators did not change, a vacancy did not arise as per the Section 1 definition of that term.

The controversy regarding this matter led the Parties to agree to a side letter attendant to the 1999-2001 Collective Bargaining Agreement that they have continued to honor during the current 2001-2003 Agreement. The Union's proposal with regard to Section 1 of Article VII would incorporate that side letter into the Agreement.

The second dimension of the Union's proposal is the result of Arbitrator Bernstein's 2002 arbitration award. In that award, Arbitrator Bernstein found no contractual bar to the Employer's refusal to consider transfer requests to the newly created Judicial Clerk III positions by several employees then in the Judicial Clerk III classification. Because an employee cannot have knowledge of a vacancy before the new position creating that vacancy is established, the Union reasons that the Employer is able to take unfair advantage of Arbitrator Bernstein's interpretation of Article VII, thereby denying bargaining unit employees transfer rights to which they should be entitled.

Issue 4: Overtime

The Union proposes to alter the Article VIII, Hours of Work provision of the Collective Bargaining Agreement by changing the Section 3.A.1. definition of "Overtime" to read: "Time that an employee works in excess of forty (40) hours per week **or any time worked on a Saturday or Sunday.**" The Union contends its proposal springs from a grievance settlement regarding the pay to be afforded bargaining unit employees who are required to work overtime assisting judges during weekend court appearances in Blackhawk County. By the terms of that grievance settlement, employees doing this weekend work are paid a minimum number of hours at the overtime rate. Because the Employer is currently paying overtime for this Saturday and Sunday work, the Union contends its proposal will result in no additional cost to the Employer.

The Union insists that the current contract between the Employer and AFSCME in the other seven Iowa judicial districts does not provide an appropriate treatment for employees in this bargaining unit. The primary reason for that assertion is the fact that part-time bargaining unit employees required to work weekend overtime would receive straight time pay for that work under the AFSCME contract provision (providing for a thirty-five cent per hour weekend differential in employees' contractual wage rate).

Issue 5: Wages

The Union proposes the following changes in the Article IX, Wages and Fringe Benefits provision of the Collective Bargaining Agreement:

A. Change Section 1, Wages, to read:

On the first day of the pay period that includes July 1, 2003, each hourly wage rate in Pay Plan 1/01/03 – 6/30/03 shall be increased by the amount of two and one-half percent (2.5%) for all employees in District 1. Additionally, all employees eligible for within-range step increases shall receive such increases in accordance with their eligibility date. Such step increases shall be automatic.
On the first day of the pay period that includes January 1, 2004, each hourly wage rate in the Pay Plan effective July 1, 2003 shall be increased by the amount of two and one-half percent (2.5%) for all employees in District 1. Additionally, all employees eligible for within-range step increases shall receive such increases in accordance with their eligibility date. Such step increases shall be automatic.

On the first day of the pay period that includes July 1, 2004, each hourly wage rate in the Pay Plan effective January 1, 2004 shall be increased by the amount of two percent (2.0%) for all employees in District 1. Additionally, all employees eligible for within-range step increases shall receive such increases in accordance with their eligibility date. Such step increases shall be automatic.
On the first day of the pay period that includes January 1, 2005, each hourly wage rate in the Pay Plan effective July 1, 2004 shall be increased by the amount of two percent (2.0%) for all employees in District 1. Additionally, all employees eligible for within-range step increases shall receive such increases in accordance with their eligibility date. Such step increases shall be automatic.

B. Change Section 2, Deferred Compensation, to read:

The Employer shall match employee contributions to I.R.C. 457 deferred compensation plans at the rate of one dollar ($1.00) for each two dollars ($2.00) contributed by the employee up to a maximum of **thirty-five dollars ($35.00)** per month effective July 1, 2004.

The Union prefaces its argument on the Wages and Fringe Benefits issues by pointing to the recent negotiation history between the Parties on these matters. It notes that it has twice been obliged to arbitrate the issue of wages, first in 1999 and again in 2001. The Union insists there is no justification under the Section 20 Iowa Public Employment Relations Act criteria for the Employer's wage freeze proposal. It notes there have been voluntary settlements with the State in other bargaining units. The state police officers and the professional social services and science units represented by the Iowa United Professionals have settled for a 2 percent across-the-board increase for both FY04 and FY05, plus step increases for eligible employees.

The Union notes further that in just the last week Governor Vilsack stated publicly that there has been enough new revenue growth to cover whatever pay raise for state employees gets approved in collective bargaining. It also obseves that the Chief Justice has requested a 9.6 percent increase from the legislature for the Judicial Branch budget. It also avers that the reorganization of the current eight judicial districts statewide should save some money during the next two fiscal years by eliminating redundant management positions.

The Union points out that the Consumer Price Index (CPI) rose at a rate of 2.4 percent in calendar year 2002. That cost-of-living statistic, coupled with the clear evidence that the state's economy is recovering from its recent malaise, propels the Union to assert that its wage increase proposal is more reasonable than the wage freeze advocated by the Employer. The Union argues that the wage increases it proposes are necessary in order to close the one percent wage differential between the bargaining unit employees it represents and the Judicial Branch employees in the seven other judicial districts represented by AFSCME.

With regard to the deferred compensation issue, the Union notes the State voluntarily granted AFSCME-represented employees this benefit while it forced the PPME to take the issue to arbitration, where this benefit was secured. It notes the recent settlement of the state police bargaining unit raises their employer maximum match to $50, compared to the current $25 one-to-two match by the Employer accorded bargaining unit employees. Because it proposes only a $10 increase in the matching amount and would postpone that increase until the second year of the Agreement beginning July 1, 2004, the Union maintains its proposal is reasonable.

Issue 6: Insurance

The Union proposes that the following changes be made in the Article IX, Wages and Fringe Benefits provision of the Collective Bargaining Agreement:

A. Change Section 3-Health Insurance, Section A.1 and 3. to continue the current incentives for employees to change from the Plan 3 Plus to the Iowa Select coverage plans.

B. Change the last sentence in the first paragraph of Section 4, Dental Insurance, to read: If a full-time employee elects a family plan, the Employer shall contribute fifty percent (50%) of the total family premium.

C. Appendix D, Dental Insurance Coverage

A. Increase the annual maximum plan payment per person per year in Paragraph D from $750 to $1,500.

B. Increase the lifetime maximum for Orthodontics in Paragraph E from $750 to $1,500.

C. Add Periodontal Services at 50% UCR.

D. Add Cast Restorations (Prosthetics) at 50% UCR.

The Union notes that the dispute with regard to insurance rates is mainly over changes in the prescription drug program proposed by the Employer and changes it proposes in the dental plan. It describes its proposed changes in the dental insurance plan as being based on the need to achieve comparability with the AFSCME judicial units. Employees in those units are accorded a 50/50 split in the family dental insurance premium with the Employer, and the annual maximum cap for benefits coverage was recently increased to $1,500.

The Employer proposes changing the base Iowa Select prescription drug plan coverage from the employee paying 20 percent up to a maximum out-of-pocket expenditure of $250 for singles and $500 for families to a three-tier drug plan with separate co-pays that do not go toward a maximum out-of-pocket limit. In addition, the Employer proposes to raise those co-pays from $5/$15/$30 to $10/$25/$40. The Employer also proposes adding a ninety-day mail order provision whereby employees are required to pay two co-pays up front for the first two months and then get the last month without a co-pay.

In the Union's view, the Employer's proposal to increase the present prescription drug co-payments, coupled with its dental insurance proposals, present the opportunity for a *quid pro quo* exchange. At the hearing, it stated its puzzlement at the Employer's failure to frame the issue in that manner.

Issue 7: Leaves of Absence

The Union proposes that the current language of Article IX, Section 9.C. of the Collective Bargaining Agreement concerning the use of the increments for sick leave usage remain unaltered. It notes that the current 1/10 hour increment standard is used in other places in the Agreement (e.g., Article IX, Section 10.D. regarding vacation). The Union reasons it would make no sense for the Agreement to use different fractional hour measures in different provisions.

Conclusion

Based on the arguments summarized above, the Union takes the position that its proposals on the issues at impasse are more reasonable than those advanced by the Employer. Accordingly, it asks the Fact Finder to adopt each of those proposals in his recommendations for settlement.

IV. POSITION OF THE EMPLOYER

The Employer submits that the Parties' bargaining relationship has been strained in recent years and during the term of the current Collective Bargaining Agreement by the actions the Judicial Branch was forced to take in response to budget cuts and shortfalls in appropriations imposed by the Legislature. It notes that in November 2001 the Legislature cut the Judicial Branch's appropriation by approximately $4.5 million. In response to that cut, the Employer laid off 117 employees statewide, reduced the hours of 67 employees, and demoted 70 supervisors back to bargaining unit positions. In the First Judicial District, nine employees were laid off, five elected to exercise their bumping rights, and another ten had their hours reduced. Eight supervisors were demoted back to bargaining unit jobs.

Like the Union, the Employer points to the awards of Arbitrator Neil Bernstein, Hugh Perry, and Paul Lansing that resulted from its decisions in late 2001 to lay off bargaining unit employees and demote a number of supervisors to bargaining unit positions, as well as its subsequent actions when bargaining unit vacancies were posted for bid. In the Employer's view, the arbitrators' vindication of its interpretation of the seniority, layoff, and transfer Articles of the Agreement forms the basis for many of the Union's proposals here today. It characterizes those proposals by the Union as "sour grapes." The Employer insists that it is not the Fact Finder's proper role to rewrite the Collective Bargaining Agreement as interpreted by these three arbitrators. Therefore, it urges the Fact Finder to reject the Union's attempt to achieve in negotiations what it was unable to achieve through arbitration of the three subject grievances.

Issue 1: Seniority

The Employer proposes that no change be made in Article V, the Seniority provision of the Collective Bargaining Agreement. With regard to the Union's proposal to change the Section 1 definition of the term "seniority," the Employer emphasizes that that definition has remained unaltered throughout the entire bargaining history between the Parties. The Parties knowingly chose to use the term "employer seniority" instead of the term "bargaining unit seniority," and the fact that this choice had some negative outcomes for bargaining unit employees during the 2001 layoffs is, by the Employer's test, not sufficient reason to change the definition of the term. Instead, it believes that any such changes should be made by the Parties through the collective bargaining process.

The Employer advances the same arguments with regard to the Union's proposal to amend Section 3 of Article V, resulting in all seniority dates being recalculated back to July 1, 2001. Because Arbitrator Bernstein found that in November 2001 the Employer followed all contractual requirements when it created the disputed Judicial Clerk III bargaining unit positions, the Employer maintains that the Fact Finder should not recommend reversal of that result.

Issue 2: Layoff Procedures

The Employer proposes that the current language of the Article VI Layoff Procedure provision of the Collective Bargaining Agreement remain unchanged. It takes particular exception to the Union's proposal that Section 1 of Article VI be amended to require management to first lay off employees before placing any bargaining unit member on furlough (involuntary unpaid leave). It argues that management cannot be denied these typical methods of dealing with budget shortfalls and the concomitant need to reduce work hours without improperly intruding into its rights to manage the day-to-day operations of the District.

The Employer observes that it is not philosophically opposed to the concept articulated in the Union's proposal to amend Section 2.G. of Article VI by granting bargaining unit employees who bump out of a classification a superior right to recall to that classification when a vacancy arises in it. It avers it is the Union's linkage of this proposal to other layoff-related issues that has rendered this proposal unacceptable.

The Employer takes issue with the Union's proposal to delete Section 2.I. of Article VI because it directs the Parties to the order of filling vacancies under Article VII, Section

1. The fact that Arbitrator Bernstein relied upon this provision in fashioning the award the Union now finds so objectionable is not, the Employer believes, good reason to delete it from the Agreement. The Employer claims that this provision harmonizes and coordinates Articles VI and VII and therefore must be retained in the Agreement.

Issue 3: Transfer Procedures

The Employer proposes that the current language of the Article VII, Transfer and Vacancies provision of the Collective Bargaining Agreement remain in its present form. In its view, the Union's proposal to change the definition of vacancy in Section 1.1. of Article VII by adding the phrase "increase the number of employees in a job classification" would place Section 1 at odds with other provisions of the Agreement. Thus, it notes that Article IX, Section 1.C. provides for automatic promotions from the Judicial Clerk I to the Judicial Clerk II classification and from the Case Coordinator I to the Case Coordinator II classification. These promotions typically are "in place" without any change in location, work schedule, or other duties and do not result in an increase in the number of employees. For that reason, the Employer is convinced it makes no sense for transfer rights to be triggered when this type of automatic promotion occurs.

The Employer finds equally confusing the Union's proposal to amend Section 2 of Article VII. It describes the current process for transfer as a "registration process" that requires employees to indicate their desire to transfer to a given classification in advance. It is convinced the Union's proposal would only confuse employees and management officials. Therefore, it believes that adoption of the Union's proposal is not warranted.

Issue 4: Overtime

The Employer proposes that the current language of the Article VIII, Hours of Work provision and the Section 3 Overtime provision remain unchanged. It insists that requiring overtime for hours worked on Saturday or Sunday adds unnecessary expense to its cost of operations. It submits that management always attempts to minimize weekend work, and acknowledges further that by the side letter to the current Agreement what little weekend work that currently occurs normally qualifies for overtime. Therefore, the Employer believes it is not appropriate to contractually require that result. Current contract language requires that overtime be paid for all work over forty hours in a given week. The Employer sees no reason for changing that current state of affairs.

Issue 5: Wages

The Employer claims that its proposals on the Article IX, Wages and Fringe Benefits provision of the Collective Bargaining Agreement are more reasonable than those advocated by the Union. It proposes that bargaining unit wages be maintained at the current levels for the next two contract years. The Employer acknowledges that there is a pattern in the settlements to date among state employee bargaining units of 2 percent annual increases. It emphasizes that the Union's proposal of two 2.5 percent general wage increases during the first year of the Agreement, and two 2 percent wage increases during the second year of the Agreement, substantially exceeds the 2 percent "pattern" that can be discerned in the state employee unit settlements to date. Thus, it contends the Union's proposal is not reasonable.

The Employer argues further that its proposal is the least expensive to the public of the two before the Fact Finder. Because the Union's proposal significantly increases the Employer's costs, particularly due to the compounding of the semi-annual wage increases, the Employer is convinced that proposal should be rejected. The Employer observes that its proposals with regard to all economic issues would provide total wage and benefit increases of 3.3 percent during the first year and 5.22 percent during the second year when insurance costs are taken into account. Bargaining unit employees would receive a total of $191,257 more over the life of the Agreement. In comparison, the Union's proposal would provide total wage and benefit increases of 6.71 percent during the first year and 6.22 percent during the second year of the Agreement. Those proposals would require an additional $583,479 to be expended by the Employer during the life of the Agreement.

In the final dimension of its argument regarding wages, the Employer asserts that even with wages frozen during the next two contract years, the pay afforded bargaining unit employees would still be higher than that earned by comparable individuals employed by county governmental units in the First Judicial District. Because Interest Arbitrator Ronald Hoh in 1991 and Interest Arbitrator Stanley Michelstetter in 1999 both found county employees to be a viable comparability group, the Employer insists their wages should be considered here.

Issue 6: Insurance

The Employer proposes modifying Article IX, Section 4.1. by deleting its second, third, and fourth paragraphs, which currently provide plan movement incentives to employees to change from Plan 3 Plus to Iowa Select for employees on the single coverage plan. It also proposes eliminating the second, third, and fourth paragraphs from subsection 3 of Section 4, which provides the same incentive for health insurance coverage plan change to employees on the double-spouse coverage plan. The Employer sees its proposal as simply removing an obsolete incentive added during the last negotiations intended to entice employees to move to plans with more managed care features because those incentives were not effective.

The Employer also proposes to amend Article IX, Section 4.A. by changing the current out of pocket maximums for the three-tier prescription drug program (generic/brand name formulary/brand name non-formulary) of $5/$15/$30 to $10/$25/$40. It further proposes to add the following sentence to Section 4.A.: "Effective 1/1/03, Program 3 Plus and Iowa Select will be modified to include a mail order prescription provision where two co-payments will be paid for a 90 day supply for maintenance drugs determined by the carrier." The Employer resists the Union's proposal to increase its contribution to the dental insurance premiums of bargaining unit employees and to enhance the benefit level provided by that plan primarily because those same benefits are not available to most state employees at this time.

Issue 7: Leaves of Absence

The Employer proposes that the current language of Article IX, Section 9.C be amended to provide that Employees may utilize sick leave from their sick leave accounts in increments of not less than one minute instead of the current one-tenth of an hour minimum increment. It asserts this change is justified by the fact that its human resources software now permits leave usage to be tracked minute by minute.

Conclusion

Based on the arguments summarized above, the Employer maintains that its proposals on the issues at impasse are more reasonable than those advocated by the Union.[1] Given the approximate 108 percent increase in premiums over the last five years in the single Plan 3 Plus and the concomitant 83% increase in premiums in the family Plan 3 Plus coverage during the same period, the Employer submits that its decision to devote scarce dollars to a tax-free benefit like health insurance makes more sense for bargaining unit employees than to put that same money into wages that will result in payroll taxes for the Employer and the employees. Accordingly, the Employer asks that its positions on the issues at impasse be recommended by the Fact Finder.

V. ANALYSIS

The Parties' current impasse is of two primary origins. First, the continuing budget problems faced by the Employer due to the State's revenue shortfalls in recent years constrain its ability to underwrite wage and fringe benefits increases. Second, layoff and recall actions by the Employer that resulted from those budget constraints led to the several arbitration awards the Union seeks to remedy through this Fact Finding proceeding.

The Issues at impasse can be clustered into three primary categories: (i) seniority, layoffs and transfers; (ii) overtime and shift differential; and (iii) wages and insurance. The remaining issue, pertains to the Employer's proposal to amend Article IX, Section 1.C. of the Wages and Fringe Benefits provision of the Collective Bargaining Agreement by deleting the bolded portion of that paragraph set out below.

> The job classifications of Judicial Clerk I and Case Coordinator I listed in Appendix A are entry-level classifications. After six (6) months of service in these classifications, the employee shall receive a performance evaluation. After twelve (12) months in these classifications, the employee shall receive a performance evaluation **and be promoted to he next higher job classification in that series unless the employee has received a leass than satisfactory one-year performance evaluation.** Employees whose performance is not satisfactory, shall be reevaluated every ninety (90) calendar days and shall remain in the entry level classification until their performance reaches the satisfactory level.

On February 3, 2003, the Iowa Public Employment Relations Board issued a Ruling on the Employer's petition for an expedited negotiability ruling with regard to this proposal. The Board held that the bolded portion of Subsection C.1. is a permissive subject of bargaining. The bolded phrase is the only portion of Subsection C.1. in dispute. The Union and the Employer both propose retaining the remainder of the provision as part of the Agreement. Because the bolded phrase is a permissive item and

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[1] Employer Exhibit Nos. 2 and 8 which constitute the Employer's proposals and supporting arguments on the issues at impasse make no reference to the Article VIII, Section 8 Shift Differential Issue. For that reason, and because the Union withdrew its pre-fact finding proposal on this Issue, it will not be addressed in the Analysis section of this Report and Recommendations.

not a proper subject for fact finding, the undersigned is without authority to consider it. Consequently, Article IX, Section C.1. will not be addressed further.

Issue 1: Article V Seniority

The Employer proposes no change in the existing language of Article V, Section 1 of the Agreement. The Union proposes to refashion the definition of "seniority" set out in the first paragraph of Article V, Section 1 to expressly limit contractual seniority to an employee's length of continuous service in permanent bargaining unit positions. The Union would also amend the second paragraph of Section 1 to provide that a bargaining unit employee who accepts promotion to a non-bargaining unit position with the Employer breaks her bargaining unit seniority (meaning that she would no longer continue to accrue bargaining unit seniority while working in the non-bargaining unit position). Finally, in Section 3 of Article V, the Union seeks a rule whereby the bargaining unit seniority date for all employees newly entering the bargaining unit after July 1, 2001, would be established as of the date they assume the bargaining unit position.

The Fact Finder has carefully evaluated the 2002 Award of Arbitrator Neil Bernstein cited by the Union. Arbitrator Bernstein held (at page 11 of his Award) that "all employees of the First District [including non-bargaining unit supervisors] are eligible to bid on in-house postings." Observing that "the [A]greement [including the Article V, Section 1 definition of "seniority"] does not contain a sharp demarcation between employees who are in the bargaining unit and those who are not," Arbitrator Bernstein concluded that because "an employee who joins the bargaining unit after working for the District for many years in a non-[bargaining] unit job would not come into the unit as a new hire; under Article V, Section 1, their seniority would date back to their date of initial hiring in any permanent position." Thus, Arbitrator Bernstein effectively concluded that the Employer and the Union mutually intended to grant all employees of the District (i.e., anyone who is not a "new hire"), including non-bargaining unit supervisors, the right to bid on bargaining unit jobs.

Suffice it to say the Fact Finder finds the result in the Bernstein Award curious. It is difficult for the undersigned to imagine that in negotiating the Article V Seniority provision the Parties mutually intended that supervisory employees without prior bargaining unit service would be permitted to exercise their non-bargaining unit employment seniority to bid into newly created Judicial Clerk III positions and then be retained over less senior employees in that classification when the Employer effected a previously announced reduction in force. If the Employer and the Union had intended so unusual a result, it seems very likely that they would have explicitly stated their intent in Articles V and/or VII of the Agreement.

Regardless of the Fact Finder's view of what the proper meaning and application of Article V the fact remains that Arbitrator Bernstein's interpretation of that provision must stand. Arbitrator Bernstein effectively held that the omission of the term "bargaining unit" from the Section 1 definition of "seniority" meant that the Parties did not intend to bar supervisors excluded from the bargaining unit to nevertheless exercise their employment seniority to bid into bargaining unit positions that apparently were created by the Employer expressly to permit it to avoid laying off these supervisory employees whose jobs had been eliminated.

Puzzling as the result and effect of the Bernstein Award may be, it must be deemed *stare decisis* as to the proper reading of Article V regarding this issue. The Bernstein Award also must be deemed to have established the bargaining unit seniority standing of the eight supervisors who bid to the Judicial Clerk III vacancies in November 2001. That result having been achieved in grievance arbitration, the Fact Finder cannot properly recommend that it be undone here.

The Fact Finder does believe that it makes little sense for a collective bargaining agreement to grant bargaining unit seniority to non-bargaining unit supervisory employees for purposes of bidding on job vacancies and avoiding layoff. The Union correctly asserts that there is a colorable question as to the legality of such a contract provision.[2] The rule to that effect established by the Bernstein Award will almost certainly continue to be a source of friction between the Parties. However, any change that rule is most appropriately made through collective bargaining between the Employer and the Union and not as the result of the recommendation or award of a neutral in an interest impasse proceeding. Therefore, the Fact Finder will recommend that the Union's proposal to modify Article V, Sections 1 and 3 not be adopted as part of the Collective Bargaining Agreement.

Issue 2: Layoff

The Employer proposes no change in the existing language of Article VI, Section 1 of the Agreement. The Union proposes several changes in the layoff-related procedures set out in Articles VI and VII that, like the Article V seniority related matters addressed above, arose as a result of the Company's layoff of a number of bargaining unit employees in November 2001. The changes address matters raised by the subsequent awards of Arbitrators Bernstein, Perry and McGilligan.

The changes proposed by the Union in the Article VI Layoff Procedure provision would: (i) require the Employer utilize layoffs in lieu of unpaid furloughs if it becomes necessary to reduce bargaining unit work hours and wage costs, absent mutual agreement by the Parties that unpaid furloughs will be permitted; (ii) establish that employees whose positions are eliminated in a reduction in force who elect to bump to another job instead of accepting layoff have a right to be recalled their former classification before any other employee is promoted to that classification, a laid off employee is recalled to it, or a new employee is hired to fill the vacancy; and (iii) provide that an employee laid off will not lose her recall rights if she rejects recall to a position that is less than a full-time equivalent or in a lower pay grade that the job from which she

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[2] Citing *Marshalltown Education Association v. Public Employment Relations Board*, 299 NW2d 496 (Iowa 1980), the Union asserts that it may be illegal for the Parties to agree to a contractual provision effectively granting supervisors bargaining unit seniority, because it would result in the Union being compelled to comply with a contractual provision that imposes a mandatory topic of bargaining (seniority) for the benefit of supervisors who are excluded from the coverage of the Iowa Public Employment Relations Act. Assuming, *arguendo*, that the Union's claim that an Agreement provision interpreted by an Arbitrator to implicitly grant non-"employee" supervisors bargaining unit seniority is not a mandatory item, it would seem the proper forum for that claim is a negotiability proceeding before the Public Employment Relations Board pursuant to PERB subrule 621-6.3(2). The Fact Finder is without authority to make a determination to that effect within the context of this Section 7 proceeding.

was laid off. The Union further proposes to change the Article VII, Transfers and Vacancies provision by altering the Section 1 order of filling vacancies to require that first priority be given to employees displaced from their classification who bumped down to another classification to avoid layoff, allowing them to return to their previous classification.

The most defensible of the Union's proposals with regard to Articles VI and VII are the two that seek to guarantee employees displaced in a layoff who bump to another classification and remain employed the first right to fill vacancies that subsequently arise in the classification from which they were displaced. Not only does that seem fair on its face, this proposal also jibes with standard labor relations practice with regard to the recall rights of displaced employees. Furthermore, at the hearing the Employer stated that it was not philosophically opposed to the concept reflected in this dimension of the Union's proposal, objecting instead to its linkage with other layoff-related proposals by the Union to which it objects.

It is true that granting displaced employees who bump to another classification instead of taking layoff a superior right to recall to their former classification runs counter to findings of Arbitrators Perry and McGilligan regarding the Parties' likely intent as to how the latent ambiguity created by the interface of Article V, Section 2.H. and the last paragraph of Article VII, Section 1 of the Agreement should be reconciled. Nevertheless, the absence of any real controversy between the Parties regarding the principle served by the Union's proposal, along with the other facts cited above propel the Fact Finder to conclude that Article VI, Sections 2.G.2. and H, and the last paragraph of Article VII, Section 1 should be amended in the manner advocated by the Union. He will so recommend.

None of the other changes in Article VI sought by the Union has been shown to be justified by the facts. Therefore, no further changes will be recommended in Article VI of the Agreement.

Issue 3: Transfers

The Employer proposes no change in the existing language of Article VII, Sections 1 and 2 of the Agreement. The Union proposes to alter Section 1 by broadening the definition of "vacancy." It further proposes to amend Section 2 by inserting language permitting employees to file a transfer request during the posting period for a vacant position.

The Union's proposal to change Article VII, Section 1 is an effort to memorialize in the Collective Bargaining Agreement the terms of a Side Letter entered into by the Parties for the 1999-2001 Agreement that has continued to be honored for the life of the 2001-03 Agreement. Paragraph 4 of that Side Letter states: "If the Employer increases the number of employees in a job classification, then the Employer will utilize the procedures of voluntary transfer, in-house posting, recall, and new hire (in that order) to accomplish such increase."

The Employer's assertion that this provision would result in confusion is founded solely on the example of the automatic promotion now provided by Article IX, Section 1.C. for employees in the Judicial Clerk I and Case Coordinator I classifications to the next higher classification. The Employer's argument regarding automatic promotions

makes sense. However, its successful negotiability petition brought before the Iowa PERB will almost certainly result in the elimination of those automatic promotions. Given that fact and the four-year existence of the Letter of Agreement provision on which the Union's proposal is founded, the Fact Finder has concluded that adoption of the Union-proposed change in Article VII, Section 1 of the Agreement is warranted and he will recommend same. However, that recommendation will be subject to the caveat that it not apply to automatic promotions situations like that now contemplated by Article IX, Section 1.C.

The Union's proposal to change Section 2 of Article VII to permit employees to make transfer requests after vacancies are posted is not irrational. However, it has failed to demonstrate how the rights of bargaining unit employees are significantly prejudiced by the present requirement of Article VII, Section 2 that they make known their desire to transfer to a particular position (a specific opening in a classification for which they are qualified) before a vacancy in that position is announced. Therefore, the Union's proposal to amend Article VII, Section 2 in this regard will not be recommended.

Issue 4: Overtime

The Employer proposes no change in the existing language of Article VIII, Section 3 Overtime provision of the Agreement. The Union proposes to alter the Section 3 definition of "overtime" to require the payment of overtime wages for any time worked on a Saturday or a Sunday. The Union maintains its purpose in proposing to amend Article VII, Section 3 in this manner is to continue the established past practice resulting from the May 17, 1999, Settlement Agreement arising from the Grievance of Bonnie Meyer, *et. al* .

The Fact Finder has been shown no evidence to prove that the Employer is abusing the terms of the May 17, 1999, Settlement Agreement or that it has asserted a right to terminate it. The past practice arising under the Settlement Agreement is on its face binding on the Employer, it having continued in place for nearly two years since the June 30, 2001, expiration date of the Settlement Agreement. For that reason, and because the Employer's position on this Issue impliedly contemplates that the established practice will continue, the Fact Finder concludes that incorporation of the Union's proposal into the Agreement is not warranted. The Fact Finder will recommend that the Union's proposal not be adopted.

Issue 5: Wages

The Employer proposes that the wages of bargaining unit employees specified in Article IX, Section 1 of the Agreement not be increased, remain frozen for the two-year term of the new Agreement. The Union proposes a 2.5 percent across the board pay increase effective July 1, 2003, a 2.5 percent across the board pay increase effective January 1, 2004, a 2.0 percent across the board wage increase effective July 1, 2004, and 2.0 percent across the board wage increase effective January 1, 2005. The Union further proposes that the Article IX, Section 2 Deferred Compensation provision of the Agreement be amended to provide a $35.00 per month maximum for the Employer's match to the I.R.C. deferred compensation plans of bargaining unit employees, an increase of ten dollars from the current $25.00 maximum.

The positions of the Parties on this key issue are straightforward. The Employer asserts that the State's fiscal difficulties and the recent unfavorable experience of the Judicial Branch with the legislative appropriation process establishes that its proposal of a two-year wage freeze is justified. In contrast, the Union avers that the Employer can in fact afford a reasonable wage increase. It submits further that a wage increase is necessary to close the approximate one percent wage gap that presently exists between the wages of bargaining unit employees and the employees of the seven other judicial districts represented by AFSCME.

The Fact Finder is persuaded that the most appropriate comparative standard for measuring the adequacy of bargaining unit employees is the wages paid Judicial Branch employees in the seven other AFSCME-represented judicial districts. The wages paid comparable county employees are not irrelevant, but they are less relevant than the wages paid comparable state employees. At the same time however, the undersigned is not convinced that this is the contract cycle when the one percent wage gap between this bargaining unit and the seven AFSCME units can be closed.

The evidence and argument adduced by the Parties prompt the Fact Finder to conclude that the current fiscal condition of the State is such that, presuming rational funding decisions by the legislature, the Employer will be able to underwrite reasonable wage increase for bargaining unit employees during the next two contract years. The State's relatively stable economic condition and Governor Vilsack's recent statement that he believes there will be revenue sufficient to cover whatever pay increases are negotiated for state employees in the current round of bargaining support this inference. Also relevant are the 2.0 percent wage increases bargained in the three State employee units (the State Police Unit represented by the State Police Officers Council and the Social Services and Science Units represented by the United Electrical Workers/Iowa United Professionals) that have settled to date.

Having carefully weighed all of the relevant evidence adduced by the Parties in light of the appropriate criteria for ascertaining an appropriate wage increase, including the 2002 calendar year increase in the Consumer Price Index of 2.4 percent, the Fact Finder has concluded that 2.0 percent wage increases in each of the two coming contract years - the first effective July 1, 2003, and the second effective July 1, 2004, – are warranted. Those wage increases will be recommended.

The Union has not made a convincing case for the increased maximum Employer match to the deferred compensation plans of bargaining unit employees' contributions provided by Article IX, Section 2 of the Agreement. Therefore, that benefit increase will not be recommended.

Issue 6: Insurance

The Employer proposes to eliminate the Article IX, Sections 4.A.1. and 4.A.3. incentives intended to encourage bargaining unit employees to change to the Iowa Select health insurance coverage plan. It also seeks to change the out of pocket maximums for the three-tier prescription drug programs set out in Section 4.A. and to add a mail order prescription provision providing three months of drugs for two monthly payments. The Union seeks to increase the Article IX, Section 5 Employer's contribution to Dental Insurance premiums of bargaining unit employees to the same 50-50 split afforded employees in the seven AFSCME-represented Judicial Districts. It also seeks

the same $1,500.00 level of maximum annual benefits now provided by the AFSCME contract.

Juxtaposition of the Parties' respective proposals on the two impassed health insurance issues reveals the basis for a *quid pro quo* tradeoff that, in the absence of evidence to indicate either of the proposals is not warranted, would appear to constitute a rational basis for settlement of the impassed health insurance issue. The Employer has failed to make a convincing argument as to why employees in the First Judicial District should be afforded the same dental insurance premium contributions and benefits levels as employees in the seven other judicial districts statewide. The Union has not offered evidence to prove that the increased out of pocket maximums for prescription drugs are not justified. Consequently, the Fact Finder has concluded that a tradeoff of the Parties' two primary health insurance proposals constitutes a reasonable basis for settlement of this Issue.

The Fact Finder will recommend that the Employer's proposals to amend Article IX, Section 4. A. of the Agreement to increase the out of pocket maximums for the three-tier prescription drug program to $10/$25/$40 and to add the mail order prescription provision whereby two co-payments will be paid for a 90 day supply for maintenance drugs determined by the carrier be incorporated into the Agreement. He will also recommend adoption of the Union's proposal to amend Article IX, Section 5 to set the Employer's Dental Insurance premium contribution for the family plan coverage at 50 percent of the premium amount. He will further recommend that Paragraph D of Appendix D of the Agreement be amended to increase the maximum annual dental insurance plan per person benefit to $1,500.00. The Fact Finder will recommend that the changes to the current language of Article IX, Sections 4.A.1. and 3. not be adopted.

Issue 7 – Leaves of Absence

The Employer proposes to change Article IX, Section 9.C. to provide that Employees may utilize sick leave from their sick leave accounts in increments of not less than one minute, instead of the current one-tenth of an hour minimum increment. The Union proposes to retain the current one-tenth hour increment for sick leave utilization.

The analysis here need not be lengthy. The Employer has not suggested that the current one-tenth hour increment for sick leave usage has resulted in any problems. The Union contends it makes sense to retain the one-tenth hour increment because that same standard is used elsewhere in the Agreement. The absence of proof of a problem with the current increment and the fact that it used elsewhere in the Agreement propels the Fact Finder to conclude that no change is warranted in Article IX, Section 9.C.. Therefore, no change in Article IX, Section 9.C. will be recommended.

VI. SUMMARY OF THE FACT FINDER'S RECOMMENDATIONS

The Fact Finder recommends as follows with regard to the impassed Issues before him.

1. Issue 1: Seniority

   The Fact Finder recommends no change in the current language of Article V of the Collective Bargaining Agreement.

2. Issue 2: Layoff Procedure

The Fact Finder recommends that the last paragraph of Article VI, Section 2.G.2. be amended to read as below.

> Any employee who elects to bump and remain on active employee status in the bargaining unit shall have the right of recall to the classifications the employee formerly occupied, before any other person may be promoted to, or an employee removed from active status by lay off is recalled, or a new employee is hired for such classification by the Employer enforcing the layoff. Recall for bumped employees shall be offered in order of seniority beginning with employees with the greatest bargaining unit seniority who formerly occupied the classification provided that the employee shall not lose their right of recall by refusing recall to a position that is less in full-time equivalent than the employee formerly occupied in that classification.

The Fact Finder recommends further that the first clause of the sentence of Article VI, Section 2.H. of the Agreement be amended to read as below.

> Any employee laid off and removed from active payroll status because of a reduction in force shall be offered a position in the classification from which the employee was laid off, ...

The Fact Finder recommends that a new paragraph d) be added to the current language of Article VI, Section 2.H.1. of the Agreement. That paragraph would be read as below.

> d) A laid off employee who rejects recall to a position that is less in full-time equivalent or in a lower pay grade than the employee previously occupied shall not lose their recall right to a position equal or greater in hours to their previous position or equal or greater in pay grade.

The Fact Finder recommends further that the last paragraph of Article VII, Section 1 be amended to read as below.

> Permanent vacancies shall be filled in the following order:
>
> 1. Recall of employees who in a layoff were previously displaced from the classification in which the vacancy occurs but remained employed by bumping to another classification;
> 2. Voluntary transfer;
> 3. In-house posting;
> 4. Recall;
> 5. New hire.

3. Issue 3: Transfer Procedures

The Fact Finder recommends that the first numbered sentence of Article VII, Section 1, Definition of Vacancy be amended to read as below.

> 1. When the employer has approval to increase the work force, or increase the number of employees in a job classification, and decides to fill the new position.[3]

No further change in the current language of Article VII of the Agreement is recommended.

4. Issue 4: Overtime

The Fact Finder recommends no change in the current language of Article VIII, Section 3 of the Collective Bargaining Agreement.

5. Wages

The Fact Finder recommends that Article IX, Section 1 of the Agreement be amended to provide for 2.0 percent wage increases in each of the two coming contract years - the first effective July 1, 2003, and the second effective July 1, 2004. The Fact Finder recommends no change in Article IX, Section 2 of the Agreement.

6. Insurance

The Fact Finder recommends as follows with regard to the impassed health Insurance issues.

The Fact Finder recommends that the first paragraph of Article IX, Section 4. A. of the Agreement be amended to increase the out of pocket maximums for the three-tier prescription drug program to $10/$25/$40. He further recommends that the following new sentence be added to Section 4.A. of Article IX, immediately following the $10/$25/$40 prescription drug co-pay provision: "Effective 1/01/03, Program 3 Plus and Iowa Select will be modified to include a mail order prescription provision where two co-payments will be paid for a 90 day supply for maintenance drugs determined by the carrier."

The Fact Finder recommends that Article IX, Section 5 of the Agreement be amended to set the Employer's Dental Insurance premium contribution for the family plan coverage at 50 percent of the premium amount. He further recommends that Paragraph D of Appendix D of the Agreement be amended

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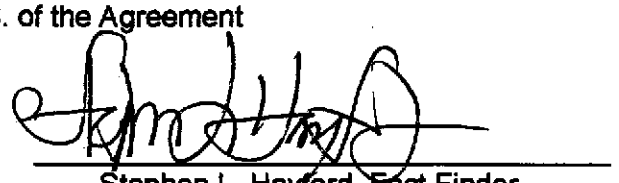
[3] If Article IX, Section 1.C. remains in its current form in the new Agreement, the Fact Finder recommends that the parties exclude from the reach of the Article VII, Section 1 definition of "vacancy" the automatic promotions that provision presently directs for employees in the Judicial Clerk I and Case Coordinator I classifications who do not receive less than satisfactory performance evaluations.

to increase the maximum annual dental insurance plan payment per person to $1,500.00.

The Fact Finder recommends that no changes be made in the current language of Article IX, Sections 4.A.1. and 3. of the Agreement.

7. Leaves of Absence

The Fact Finder recommends that no changes be made in the current language of Article IX, Section 9.C. of the Agreement



February 11, 2003
Bloomington, Indiana

Stephen L. Hayford, Fact Finder